

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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*
MELISSA OSTRANDER, *
Plaintiff, *
*
v. *
*
HUSSMANN CORPORATION, *
Defendant. *
*

CIVIL ACTION NO. 04-30197-MAP

**MEMORANDUM IN SUPPORT OF NON-PARTY, MASSACHUSETTS RETAIL
MERCHANTS INSURANCE COMPANY'S, OPPOSITION TO DEFENDANT, HUSSMANN
CORPORATION'S, MOTION FOR REASONABLE ATTORNEY'S FEES**

The non-party, Massachusetts Retail Merchants Insurance Company (hereinafter "Mass. Retail"), submits the following memorandum in support of its opposition to Defendant, Hussmann Corporation's (hereinafter "Hussmann"), motion for reasonable attorney's fees.

I. Background

It is Mass. Retail's understanding and belief that this is a products liability action arising out of an industrial injury sustained by the Plaintiff, Melissa Ostrander (hereinafter "Plaintiff"). (Def.'s Mem. Supp. Order Comply Subpoena at p. 1.) Pursuant to Massachusetts General Laws c. 152, Mass. Retail acted as the self-insurer for the Plaintiff's employer, Pleasant St. Market, Inc.

Hussmann served Mass. Retail with a deposition subpoena *duces tecum* pursuant to Fed. R. Civ. P. Rule 45. (See Subpoena, attached hereto at Ex. A.) The subpoena called for the production of "[t]rue copies of records constituting your complete file concerning Melissa Ostrander's workers' compensation claim against Pleasant Street Market...including but not limited to the following: investigation carried out with respect to the employee's claim and the employer's liability, statements taken as part of that investigation of the employee or any other person or party, photographs taken of the place of the employee's injury, surveillance reports, first report of injury, weekly indemnity payments made to Ms. Ostrander, and the dates thereof, IME reports, medical records and reports, hospital records, total amount of any lien against Ms. Ostrander's third party action, total of medical bills paid, vocational reports, nurse/case manager reports and utilization review reports." (Id.)

Mass. Retail requested the office of Curtin, Murphy & O'Reilly to respond to the subpoena on its behalf. (See Affidavit of Richard N. Curtin at ¶ 3 at Ex. B.) During the first week of December, 2004, Attorney Richard Curtin had a telephone conversation with Attorney John Stewart, counsel for Hussmann, regarding the scope of the subpoena. (Id. at ¶ 4.)

During that telephone conversation, Attorney Stewart represented that he was interested only in receiving the Plaintiff's medical records and reports. (Id. at ¶ 4.) Based on that telephone conversation, Attorney Curtin was under the belief that Mass. Retail could comply with the subpoena by producing only the medical records and reports pertaining to the Plaintiff within the possession, custody or control of Mass. Retail. (Id.)

Following the telephone conversation with Attorney Stewart, Attorney Curtin had an inter-office meeting with Attorney Chrisann Leal for the purpose of discussing the scope of the subpoena and the records to be produced in response thereto. (See Affidavit of Chrisann Leal at ¶ 4 at Ex. C.) Attorney Leal then began to review Mass. Retail's file pertaining to the Plaintiff. In addition, Attorney Leal telephoned the office of Attorney Stewart for the purposes of confirming the category of records Hussmann was seeking production of and advising Attorney Stewart when he could expect to receive said records. (Id. at ¶ 5.) Attorney Leal was advised that Attorney Stewart was not in his office, so she left him a voice mail message. (Id.) Attorney Stewart did not respond to Attorney Leal's voice mail message. (Id.)

On or about December 7, 2004, Attorney Leal mailed to Attorney Stewart approximately two inches of documents. The

cover letter accompanying the documents specifically stated that the documents being produced in response to the subpoena included medical records, medical bills, nurse case management reports, utilization reports, documents evidencing payments made to the Plaintiff, documents evidencing any liens, and reports filed with the Department of Industrial Accidents. (See Letter from Attorney Leal to Attorney Stewart of 12/7/04 at Ex. D.) The letter also stated that internal communications between claims persons at Mass. Retail and file activity notes were being withheld. (Id.)

In support of its motion for an order compelling Mass. Retail to comply with the subpoena, Hussmann has submitted a copy of a letter dated December 9, 2004 from Attorney Stewart to Attorney Leal. (Affidavit of John B. Stewart at ¶ 4.) In his December 9th letter, Attorney Stewart calls upon Mass. Retail to properly identify all withheld documents and to identify which privileges were being relied upon, or otherwise Hussmann would file a motion to compel. (Id.) Attorney Leal does not have any recollection of, or any documentation evidencing, receipt of Attorney Stewart's December 9th letter. (See Affidavit of Chrisann Leal at ¶ 6 at Ex. C). To the best of Mass. Retail's knowledge, after December 9, 2004, Attorney Stewart made no

attempt to contact Curtin, Murphy & O'Reilly either by telephone or mail to discuss Mass. Retail's response to the subpoena.

Then, on or about December 21, 2004, Attorney Leal was served with a motion for an order compelling Mass. Retail to comply with the subpoena and for reasonable attorney's fees. Upon receipt of the motion, Attorney Leal contacted Attorney Stewart's office, but was informed that Attorney Stewart was not in. (Id. at ¶ 7.) Between December 21, 2004 and December 23, 2004, Attorney Leal and Attorney Stewart exchanged several voice mail messages, but never were able to have a substantive discussion regarding the motion or Mass. Retail's response to the subpoena. (Id.)

Attorney Leal was away from the office from December 27, 2004 through December 31, 2004, but she is not aware of any attempts by Attorney Stewart to contact her, nor has any such representation been made by Attorney Stewart. (Id. at ¶ 8.) According to Attorney Leal's calculations, any opposition of Mass. Retail to Hussmann's motion was due on January 4, 2004. However, Mass. Retail decided not to oppose the motion, and instead, to produce the entire contents of its file. On or about January 5, 2005, Attorney Leal produced to Attorney Stewart Mass. Retail's entire file pertaining to the Plaintiff. Subsequently, on January 10, 2005, Hussmann withdrew its motion for an order

compelling compliance with the subpoena, but kept pending before the Court its motion for attorney's fees pursuant to Fed. R. Civ. P. Rule 37(a)(4). By the time, Hussmann withdrew its motion, the Court (Neiman, J.) had already allowed the motion in its entirety on January 7, 2005. Mass. Retail was then given until February 3, 2005 in which to respond to Hussmann's motion for attorney's fees.

II. Argument

Fed. R. Civ. P. Rule 37(a)(4) provides, in relevant part:

If the motion [to compel] is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. Rule 37(a)(4)(A).

In determining whether to impose sanctions, the court retains some discretion in the matter. 4 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2288, p. 787, cited in LFE Corp. v. Dryteck, Inc., No. 81-2902-N, 1983 U.S.

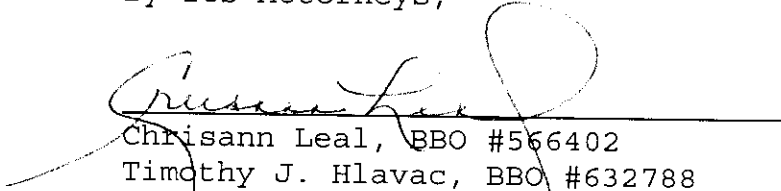
Dist. Lexis 16098 at *3 (D. Mass. June 21, 1983). The circumstances of this case do not warrant the imposition of sanctions against Mass. Retail. Mass. Retail did not refuse or ignore the subpoena. Cf. Aetna Casualty & Surety Co. v. Rodco Autobody, 130 F.R.D. 2,3 (D. Mass. March 22, 1990) (non-party witnesses objected to subpoena on date set for deposition but did not appear at deposition or produce requested documents). To the contrary, Mass. Retail responded to the subpoena by producing two inches of documents, together with a letter that clearly articulated the category of documents being produced. While it is true that Mass. Retail initially withheld certain documents, including file activity notes and inter-office communications between its agents, servants and employees, at the time it responded to the subpoena, Mass. Retail was under the good faith belief that it had satisfied the subpoena by producing all of the medical records and reports pertaining to the Plaintiff in accordance with the conversation between Attorney Curtin and Attorney Stewart. To impose sanctions under these circumstances would be unjust. See generally 7 James W. Moore et al., Moore's Federal Practice § 37.23(3) (courts might conclude that an award of expense shifting sanctions would be unjust when the party's position appeared to have been the product of a good faith misunderstanding of its rights and obligations).

Moreover, Hussmann made no good faith effort to resolve the alleged discovery dispute without judicial intervention as required by Fed. R. Civ. P. Rule 37(a)(4)(A) and L.R. 7.1 and L.R. 37.1. As grounds for its motion to compel and for attorney's fees, Hussmann asserts that Attorney Stewart sent Attorney Leal a letter on December 9, 2004, requesting that Mass. Retail identify all documents withheld and identify which privileges were being relied upon, or Hussmann would file a motion to compel. (Affidavit of John B. Stewart at ¶ 4.) Attorney Leal has no recollection of having received that letter. (See Affidavit of Chrisann Leal at ¶ 6.) Even assuming for purposes of this opposition however, that Attorney Stewart's letter was received by Attorney Leal's office, one single letter does not constitute a good faith effort to confer. See Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 101 (D. Mass. 1996) (explaining that L.R. 37.1 requires that counsel for the moving party must arrange a conference in order to attempt in good faith to narrow the areas of disagreement, and that, only if the parties fail to agree or opposing counsel fails to appear at a requested discovery conference, can a moving party file a motion to compel). Hussmann does not assert that its counsel made any attempt to contact Curtin, Murphy & O'Reilly by telephone at any time regarding the alleged discovery dispute, nor does it assert

that its counsel scheduled or even attempted to schedule a discovery conference. Instead, after drafting only one letter, Attorney Stewart filed a motion to compel. To award Hussmann the costs associated with filing that motion under these circumstances would be unjust.

WHEREFORE, Mass. Retail respectfully requests this Honorable Court to deny Hussmann's motion for attorney's fees.

Respectfully Submitted,
Massachusetts Retail Merchants
Insurance Company,
By its Attorneys,



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Certificate of Service

I herewith certify that on February 3, 2005, I served the within pleading on all parties by mail, postage prepaid to:

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